U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RONALD A. WELLS and U.S. POSTAL SERVICE,
PROCESSING & DELIVERY CENTER, West Sacramento, CA

Docket No. 00-152; Submitted on the Record;
Issued September 17, 2001

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant has met his burden of proof in establishing that he sustained an emotional condition on July 17, 1998; and (2) whether the Office of Workers' Compensation Programs properly found that appellant had abandoned his request for an oral hearing before an Office hearing representative.

On August 2, 1998 appellant, a 56-year-old mailhandler, alleged that he developed stress and high blood pressure after being threatened by his supervisor, Robert Garza, on June 14, 1998. The Office requested additional information on September 10, 1998. By decision dated February 3, 1999, the Office denied appellant's claim finding that he failed to establish an injury in the performance of duty. Appellant disagreed with this decision and requested an oral hearing on March 1, 1999. By decision dated August 17, 1999, the Office found that appellant had abandoned his request for an oral hearing.

The Board finds that appellant failed to establish that he sustained an emotional condition in the performance of duty on June 17, 1998.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or illness has some connection with the employment but nevertheless does not come within the concept of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is compensable. Disability is not compensable, however, when it results from factors such as an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.[1]

Appellant attributed his stress and aggravation of his high blood pressure to a verbal confrontation with his supervisor, Mr. Garza, on June 17, 1998. Appellant stated that he was

[1] *Lillian Cutler*, 28 ECAB 125, 129-31 (1976).

standing waiting to clock out, that Mr. Garza drove up in his cart and instructed appellant, as well as other employees, to "clock out or go back to work." Appellant responded that he had "a few more clicks." Mr. Garza told appellant to clock out immediately and appellant said no. According to appellant, Mr. Garza then dismounted his cart, rushed appellant in a threatening manner, got in appellant's face and gave appellant a direct order to clock out. Appellant clocked out but became upset about Mr. Garza's conduct. He stated that Mr. Garza singled him out for harassment.

Appellant submitted a witness statement confirming that appellant was waiting to clock out, that Mr. Garza approached and instructed appellant to clock out or go back to work, that appellant stated that he had only a few clicks left and that Mr. Garza then yelled at appellant to clock out. The witness stated that appellant protested again and that Mr. Garza then gave appellant a direct order to clock out which appellant obeyed.

The employing establishment responded and stated that there were six employees at the time clock when Mr. Garza instructed them to clock out. Mr. Garza approached appellant only after appellant refused to clock out as directed.

For harassment or discrimination to give rise to a compensable disability under the Federal Employees' Compensation Act, there must be evidence that harassment or discrimination did, in fact, occur. Mere perceptions of harassment or discrimination are not compensable under the Act. Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred. To establish entitlement to benefits, a claimant must establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.[2] In this case, appellant has submitted insufficient evidence to establish his allegation of harassment. He stated that he refused the directive of Mr. Garza to clock out as initially instructed. The employing establishment asserted that other employees were also directed to sign out and did so. Appellant received a direct order to clock out after failing to comply with the initial request. There is no indication in the record that this direct order constituted harassment or discrimination against appellant.

The Board further notes that no evidence supported that Mr. Garza acted abusively in instructing appellant to clock out, or in his delivery of a direct order. As a general rule, an employee's emotional reaction to an administrative or personnel matter is not covered under the Act. But error or abuse by the employing establishment in what would otherwise be an administrative or personnel matter, or evidence that the employing establishment acted unreasonably in the administration of a personnel matter, may afford coverage. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[3] In this case, when instructed to clock out, appellant refused and only complied when issued a direct order. The factual evidence does not establish harassment on the part of appellant's supervisor.

The Board further finds that appellant abandoned a request for an oral hearing before an Office hearing representative.

[2] *Alice M. Washington*, 46 ECAB 382 (1994).

[3] *Martha L. Watson*, 46 ECAB 407 (1995).

In a decision dated August 17, 1999, the Office found that appellant abandoned the March 1, 1999 request for an oral hearing before an Office hearing representative. The Office noted that the hearing was scheduled for August 4, 1999, that appellant received written notification of the hearing 30 days in advance, that appellant failed to appear and that the record contained no evidence that appellant contacted the Office to explain the failure to appear.

Section 10.137 of Title 20 of the Code of Federal Regulations, revised as of April 1, 1997, previously set forth the criteria for abandonment:

> "A scheduled hearing may be postponed or canceled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in assessment of costs against such claimant."
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> "A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing."[4]

These regulations, however, were again revised as of April 1, 1999. Effective January 4, 1999, the regulations now make no provisions for abandonment. Section 10.622(b) addresses requests for postponement and provides for a review of the written record when the request to postpone does not meet certain conditions.[5] Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. The section is silent on the issue of abandonment.

The legal authority governing abandonment of hearing now rests with the Office's procedure manual. Chapter 2.1601.6.e of the procedure manual, dated January 1999, provides as follows:

> "e. Abandonment of Hearing Requests.
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> "(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.
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> "Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a

[4] 20 C.F.R. § 10.137(a), (c) (revised as of April 1, 1997).

[5] 20 C.F.R. § 10.622(b) (1999).

hearing and return the case to the DO [District Office]. In cases involving prerecoupement hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.

"(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

"This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is, therefore, expected to attend the hearing and the claimant does not attend."[6]

In the present case, the Office scheduled an oral hearing before an Office hearing representative at a specific time and place on August 4, 1999. The record shows that the Office mailed appropriate notice to the claimant at the last known address. The record also supports that appellant did not request postponement, that he failed to appear at the scheduled hearing and that he failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. As this meets the conditions for abandonment specified in the Office's procedure manual, the Office properly found that appellant abandoned the request for an oral hearing before an Office hearing representative.

The August 17 and February 3, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
September 17, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6.e (January 1999).